

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORI A PERALES,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

NO. CV-11-3040-RHW

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 20 and Defendant's Motion for Summary Judgment, ECF No. 29. The motions were heard without oral argument. Plaintiff is represented by D. James Tree. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Jessica Milano.

I. Jurisdiction

On June 19, 2007, Plaintiff Lori A. Perales filed an application for Supplemental Social Security Income (SSI) and Social Security Disability Insurance Benefits (SSDIB). Plaintiff alleges that she has been disabled since October 7, 2004, due to insulin dependent diabetes mellitus, bilateral lower limb numbness, degenerative disc disease with chronic low back pain, mild to moderate bilateral carpal tunnel syndrome, status post right wrist surgery, obesity, depressive disorder, pain disorder, personality disorder, alcohol dependence, and a history of drug and alcohol abuse.

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1 Her application was denied initially and again denied on reconsideration. A
2 timely request for a hearing was made and Plaintiff appeared in a video hearing
3 before Administrative Law Judge (ALJ) Douglas S. Stults on September 2, 2009,
4 in Yakima, Washington. Plaintiff was represented by Chad Hatfield, an attorney,
5 and she was also assisted by Regina Hill, Plaintiff's advocate. Polly A. Peterson,
6 Ph.D, a vocational expert, also participated.

7 The ALJ issued a decision on November 18, 2009, finding that Plaintiff
8 became disabled on January 15, 2009, but was not disabled from October 7, 2004,
9 until January 15, 2009. The decision granted Plaintiff's SSI claim but denied the
10 claim for SSDIB because the onset of disability, January 15, 2009 was after the
11 last date insured (December 31, 2007, determined by the ALJ). *Id.*

12 Plaintiff timely requested review by the Appeals Council, which was denied
13 February 17, 2011. The Appeals Council denial of review makes the ALJ's
14 decision the final decision of the Commissioner. (42 U.S.C. §405(h)). Plaintiff
15 filed a timely appeal with the U.S. District Court for the Eastern District of
16 Washington on April 6, 2011. The instant matter is before the district court
17 pursuant to 42 U.S.C. § 405(g).

18 **II. Sequential Evaluation Process**

19 The Social Security Act defines disability as the "inability to engage in any
20 substantial gainful activity by reason of any medically determinable physical or
21 mental impairment which can be expected to result in death or which has lasted or
22 can be expected to last for a continuous period of not less than twelve months."
23 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
24 under a disability only if his impairments are of such severity that the claimant is
25 not only unable to do his previous work, but cannot, considering claimant's age,
26 education and work experiences, engage in any other substantial gainful work
27 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential evaluation process
2 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
3 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

4 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
5 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
6 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
7 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
8 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
9 416.920(b). If he is not, the ALJ proceeds to step two.

10 Step 2: Does the claimant have a medically-severe impairment or
11 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
12 claimant does not have a severe impairment or combination of impairments, the
13 disability claim is denied. A severe impairment is one that lasted or must be
14 expected to last for at least 12 months and must be proven through objective
15 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
16 severe, the evaluation proceeds to the third step.

17 Step 3: Does the claimant's impairment meet or equal one of the listed
18 impairments acknowledged by the Commissioner to be so severe as to preclude
19 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
20 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
21 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
22 impairment is not one conclusively presumed to be disabling, the evaluation
23 proceeds to the fourth step.

24 Step 4: Does the impairment prevent the claimant from performing work he
25 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
26 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
27 perform this work, proceed to the fifth and final step.

1 Step 5: Is the claimant able to perform other work in the national economy
2 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
3 416.920(f).

4 The initial burden of proof rests upon the claimant to establish a prima facie
5 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
6 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
7 mental impairment prevents him from engaging in his previous occupation. *Id.* At
8 step five, the burden shifts to the Commissioner to show that the claimant can
9 perform other substantial gainful activity. *Id.*

10 **III. Standard of Review**

11 The Commissioner's determination will be set aside only when the ALJ's
12 findings are based on legal error or are not supported by substantial evidence in
13 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
14 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
15 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
16 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
17 evidence is "such relevant evidence as a reasonable mind might accept as adequate
18 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
19 ALJ's denial of benefits if the evidence is susceptible to more than one rational
20 interpretation, one of which supports the decision of the administrative law judge.
21 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
22 support either outcome, the court may not substitute its judgment for that of the
23 ALJ." *Matney*, 981 F.2d at 1019.

24 A decision supported by substantial evidence will be set aside if the proper
25 legal standards were not applied in weighing the evidence and making the
26 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
27 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
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1 immaterial to the ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec.*
2 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

3 **IV. Statement of Facts**

4 The facts have been presented in the administrative transcript and the ALJ's
5 decision and will only be summarized here.

6 At the time of the hearing, Plaintiff was 44 years old. She earned her GED
7 when she was 17. She birthed five children, however, at various times, her
8 children were removed from her care. Plaintiff had a very troublesome childhood.
9 Her father was abusive and an alcoholic, and her husband was also physically and
10 emotionally abusive.¹ When she was 12, she was thrown from a horse and injured
11 her neck and back. She was also in a motor vehicle accident. About this time, she
12 began using marijuana. She progressed to alcohol by the age of 14, and cocaine
13 and methamphetamines by the age of 17. At the time of her hearing, she had been
14 clean and sober for one year.

15 Her mother and brother passed away in 2003. Following their deaths,
16 Plaintiff experienced significant depression and began using drugs to escape. Her
17 entire family has severely struggled with chemical dependency problems.

18 Plaintiff is insulin-dependent, and takes four insulin shots a day to regulate
19 her diabetes. She is obese.² She suffers from: gynecological problems (vaginal
20 hysterectomy, anterior repair, bladder neck suspension, prior vulvar cancer,
21 Bowen's disease), depression, bilateral carpal tunnel syndrome, iron deficiency
22 anemia, GERD, nonproliferative diabetic retinopathy, mixed hyperlipidemia,
23 diabetes, chronic back pain, pelvic pain, chronic osteoarthritis, posttraumatic

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25 ¹Plaintiff married in 1992 and separated in 1994. However, she lived with her
26 husband for six year. On one occasion, her husband physically beat her over a
27 period of 13 hours and then raped her.

28 ²She is 5'4" tall and weights close to 200 lbs.

1 stress disorder, major depressive disorder, polysubstance dependent, and asthma.

2 Plaintiff worked in janitorial maintenance, warehouses, as a bartender, as a
3 car detailer, and as a housekeeper until 2004, when the pain in her back, neck, and
4 wrists from carpal tunnel prevented her from working. She testified that she is able
5 to cook twice a week, do dishes, keep her room clean, sweep, mop, vacuum, dust,
6 make her bed, do laundry, drive a motor vehicle, shop, watch movies, listen to
7 music, camp, fish, attend AA and NA meetings, go to church, count change,
8 balance a checkbook, keep a calender to insure her bills were paid on time, and
9 read books for leisure. Plaintiff has “chaired” NA meetings and mentored others.
10 She reports that after she quit work, she has been less social, less active, more
11 depressed and wants more quiet. She does not go outside often, but likes to attend
12 church once a week if she can. She gets tired easily. She can only walk for ten
13 minutes before needing a rest.

14 **V. The ALJ’s findings**

15 The ALJ found Plaintiff to be disabled as of January 15, 2009, but not from
16 the alleged onset date of October 7, 2004. (Tr. 16.) He found that Plaintiff met the
17 insured status requirements of the Social Security Act only through December 31,
18 2007. (Tr. 15.)

19 At step one: the ALJ found that Plaintiff had not engaged in any substantial
20 gainful activity since the alleged onset of disability, October 7, 2004.³ (Tr. 18.)

21 At step two, the ALJ found that since the alleged onset date of October 7,
22 2004, Plaintiff had the following severe physical and mental impairments:

- 23 1. insulin dependent diabetes mellitus,

24 ³The ALJ noted that Plaintiff was the manager of the “clean and sober” house
25 in which she resides, for which she received \$50 a month credit toward her rent.
26 He found that this work did not rise to the level of substantial gainful activity. (Tr.
27 18.)
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2. bilateral lower limb numbness,
3. degenerative disc disease with chronic low back pain,
4. mild to moderate bilateral carpal tunnel syndrome,
5. status post right wrist surgery,
6. obesity,
7. depressive disorder,
8. pain disorder,
9. personality disorder,
10. alcohol dependence,
11. history of drug and alcohol abuse.

(Tr. 18.)

He then found that beginning on January 15, 2009, the date Plaintiff became disabled, she had the following severe physical and mental impairments:

1. insulin dependent diabetes mellitus;
2. bilateral carpal tunnel syndrome;
3. diabetic neuropathy;
4. fibromyalgia;
5. degenerative disc disease with chronic low back pain;
6. pelvic pain;
7. obesity;
8. depressive disorder;
9. pain disorder;
10. personality disorder;
11. alcohol dependence;
12. history of drug and alcohol abuse.

(Tr. 18.)

At step three, the ALJ found that Plaintiff's impairments or combination of

1 impairments did not meet or medically equal any of the listed impairments
2 described at 20 CFR Part 404, Subpart P, Appendix 1. (20 CFR 404.1520(d),
3 404.1525, 404.1526, 416.925 and 416.926). The ALJ found that the mental
4 impairment(s) did not satisfy the criteria of paragraph “C” of the applicable mental
5 disorder listing. (Tr. 21.)

6 At step four, the ALJ found that prior to January 15, 2009, Plaintiff had a
7 residual functional capacity to perform light work as defined in 20 CFR
8 404.1567(b) and 416.967(b), except who could only occasionally climb, balance,
9 stoop, kneel, crouch, and crawl; must avoid exposure to workplace hazards, such
10 as dangerous moving machinery and unprotected heights, could understand and
11 complete simple and one to three step instructions, could have only superficial
12 conduct with the general public, and could work only in small groups of co-
13 workers to avoid becoming distracted. (Tr. 22.)

14 Notably, the ALJ found that Plaintiff’s statements concerning the intensity,
15 persistence and limiting effect of her symptoms were not credible prior to January
16 15, 2009, to the extent they are inconsistent with the residual functional capacity
17 assessment. (Tr. 23.) The ALJ also noted that Plaintiff’s alleged pain and
18 symptomatology with respect to her hand limitations was not supported by the
19 medical evidence in the record. (Tr. 24.)

20 At step five, the ALJ found that beginning on January 15, 2009, Plaintiff
21 had the residual functional capacity to perform sustained work activity for less
22 than 8 hours a day and less than forty hours a week, even at the “sedentary”
23 physical exertional level as defined in 20 CFR 404.1567(a), in that Plaintiff could
24 not complete a normal workday or workweek without excessive absences or
25 interruptions due to pain and other symptomatology. (Tr. 25.). The ALJ found that
26 Plaintiff’s drug and alcohol abuse disorder was not a contributing factor material
27 to the determination of disability. (Tr. 28.)

1 **VI. Issues for Review**

2 Because the ALJ found Plaintiff to be disabled as of January 15, 2009, the
3 focus of Plaintiff's appeal is the time between the alleged onset date of October 7,
4 2004 and January 14, 2009.

5 Plaintiff presents the following issues with respect to the ALJ's findings:

- 6 1. Did the ALJ err in improperly rejecting the opinions of
7 Plaintiff's treating medical providers and finding Plaintiff's
8 disability onset date to be January 15, 2009?
9 2. Did the ALJ err in inferring an onset date of disability without
10 the assistance of a medical expert?

11 **VII. Discussion**

12 **1. Whether the ALJ improperly rejected the opinions of Dr. Chan**

13 Plaintiff asserts the ALJ improperly rejected the opinions of Dr. Chan
14 because he failed to set forth specific and legitimate reasons for rejecting Dr.
15 Chan's opinion that Plaintiff's need for absenteeism related back to April, 2007.
16 She also argues that he improperly rejected the opinions of Plaintiff's other
17 treating medical providers, including McDullough, Naiden, and Vaagen, because
18 he did not set forth specific and legitimate reasons for these medical providers'
19 opinions. Plaintiff argues that once the opinions of her treating medical providers
20 are given proper deference, the Court should find that Plaintiff is incapable of
21 working on a regular and continuing basis prior to December 31, 2007, and that
22 she was disabled prior to her date last insured. Plaintiff asks the Court to award
23 benefits as of April 30, 2007.

24 The ALJ noted that Dr. Chan in October, 2008 opined that Plaintiff could
25 perform the physical exertional requirements of light work. Dr. Chan continued
26 regular treatment of Plaintiff. Then, following an examination of Plaintiff
27 conducted on January 15, 2009, Dr. Chan opined that Plaintiff would miss, on the
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1 average, four or more days of work per month due to chronic pain, feeling of
2 fatigue, depressed mood, and panic/anxiety. He opined that such limitations had
3 existed since, at least, April, 2007.⁴ However, in April 2009, Dr. Chan opined that
4 Plaintiff could perform “sedentary” work, but that Plaintiff could not sit or stand at
5 a posture for more than 20 minutes at a time. In August, 2009, he opined that
6 Plaintiff would miss, on the average, four or more days of work per months due to
7 chronic pain and numbness and tingling of both hands and feet. Again, he opined
8 that such limitations existed since June, 2007. The ALJ gave great weight to Dr.
9 Chan’s opinion in determining that Plaintiff was disabled since January 15, 2009,
10 (Tr. 24, 25), but discounted his opinion that she had work limitations from at least
11 April, 2007. The ALJ rationalized that if Dr. Chan was of the opinion that Plaintiff
12 could not have performed sustained work activity at that time, he would have
13 noted such on his October, 2008 assessment document, rather than wait until after
14 his January 15, 2009 examination of Plaintiff. (Tr. 26.) The ALJ granted minimal
15 weight to Plaintiff’s medical providers because there were opinions in the record
16 from acceptable medical sources regarding both of Plaintiff’s physical and mental
17 limitations, which were more consistent with the evidence in the record. (Tr. 25.)

18 The ALJ ultimately concluded that Plaintiff’s condition worsened on
19 January 15, 2009, and correspondingly, her residual functional capacity
20 diminished on that date. (Tr. 26.)

21 Plaintiff argues that the ALJ erroneously concluded that the limitation to a
22 light level of exertion in 2008 was inconsistent with a need to miss four or more
23 days of work per month. The Court agrees. The ability to perform light level
24 exertion does not preclude the need to miss four or more days of work per month.

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26 ⁴The vocational expert stated that such a high level of absenteeism would result
27 in the inability to perform substantial gainful activity. (TR. 64-66.). The ALJ
28 accepted the vocational expert’s opinion.

The Court finds that the ALJ improperly rejected Dr. Chan's opinion that Plaintiff would miss at least four or more work days in a month since April, 2007. The ALJ's rationalization that her condition deteriorated, rather than existed since 2007, is not supported by the substantial evidence. Instead, the record indicates that Plaintiff has suffered from diabetes, chronic neck and back pain, and joint pain since at least April, 2007. Notably, in comparing the two lists of severe and mental impairments that the ALJ concluded was present in October, 2004, and January, 2009, the lists contain the same impairments except for the following impairments:

<u>2004</u>	<u>2009</u>
Bilateral lower limb numbness	Diabetic neuropathy
Status post right wrist surgery	Fibromyalgia
	Pelvic pain

In reviewing this comparison, the logical conclusion is that the presence of diabetic neuropathy, fibromyalgia, and pelvic pain was the reason the ALJ concluded that Plaintiff was disabled on January 15, 2009. However, the record indicates that these diagnoses were present prior to January 15, 2009. (TR. 373, 394, 503.) Given the state of the record, a logical explanation is that Dr. Chan concluded in 2009 that he needed to be specific and indicate the projected number of absences and the extent of the limitations since April, 2007. This interpretation of Dr. Chan's remarks is consistent with the record. On the other hand, the ALJ's speculation as to why Dr. Chan did not address absenteeism in his 2008 report, which was the basis for rejecting Dr. Chan's conclusions that Plaintiff's likelihood of absenteeism was present since April, 2007 is not supported by the record.⁵ As

⁵The ALJ did not find Plaintiff credible with respect to her pain, relying on notations from her treating physicians in 2005. Since 2007 on, there is nothing in the record to suggest that her treatment providers believed that she was

1 such, the Court finds that the ALJ impermissibly rejected Dr. Chan's conclusion
2 that Plaintiff would experience significant absences from April, 2007 to the
3 present.

4 **2. Whether the ALJ erred in inferring an onset date**

5 Plaintiff argues that the ALJ erred in inferring an onset date without the
6 assistance of a medical expert. Here, the ALJ determined an onset date of January
7 15, 2009, which corresponds to an evaluation that was completed on that date by
8 Dr. Chan. According to Plaintiff, Dr. Chan had noted that the limitations existed
9 since prior to the date last insured, so it is unclear why the ALJ chose to infer that
10 the disability began on the date of the doctor's evaluation. Given that the Court
11 has accepted Dr. Chan's date that the limitations existed in April, 2007, the Court
12 need not address this argument.

13 **3. Conclusion**

14 The Court finds that the ALJ erred in not crediting Dr. Chan's opinion that
15 Plaintiff was unable to work 8 hours a day, 40 days a week since April, 2007.
16 Thus, the ALJ's ultimate decision to deny Plaintiff's claim for benefits from April,
17 2007 to January 15, 2009 is not supported by substantial evidence in the record.
18 The Court finds that Plaintiff was disabled as of April 30, 2007. As such, there are
19 no outstanding issues to be resolved before determining that Plaintiff is entitled to
20 an award of benefits. *See Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000).

21 Accordingly, **IT IS HEREBY ORDERED:**

22 1. Plaintiff's Motion for Summary Judgment, ECF 20, is **GRANTED**.

23 2. Defendant's Motion for Summary Judgment, ECF No. 29, is **DENIED**.

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25 malinger. Moreover, the ALJ did not base his finding that Plaintiff was not
26 disabled since April, 2007 on her credibility. Rather, it was based on his
27 speculation as to why Dr. Chan did not make the notation regarding her absentism
28 in 2008.

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1 3. The decision of the Commissioner denying Plaintiff's claim for benefits
2 beginning April 30, 2007 through January 15, 2009 is reversed and the case is
3 remanded to award benefits consistent with this Order.

4 4. The District Court Executive is directed to enter judgment in favor of
5 Plaintiff and against Defendant.

6 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
7 file this Order and provide copies to counsel, and **close the file.**

8 **DATED** this 12th day of February, 2013.

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11 s/Robert H. Whaley
12 ROBERT H. WHALEY
13 United States District Judge

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